



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Application of Jeanette and  
Kimbal Goluska to Place a Structure on the Bed of  
Catfish Lake, Town of Washington, Vilas County

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Case No. DNR-14-047

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

Pursuant to due notice, hearing was held in Eagle River, Wisconsin on April 8 and 9, 2015, Jeffrey D. Boldt, Administrative Law Judge presiding. The parties requested the opportunity to present written closing arguments and the last was received on July 20, 2015.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are identified as follows:

Jeanette and Kimbal Goluska, by

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Department of Natural Resources, by

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**FINDINGS OF FACT**

1. On February 13, 2014, Jeanette and Kimbal Goluska (applicants), 1024 Everett Road, Eagle River, Wisconsin, filed an application with the Department of Natural Resources (Department or DNR) to construct a 45' long, 20' wide, and 10' high enclosure complete with a flat roof and railings along the perimeter, a connecting bridge with railings between the roof of the proposed structure and the second story of the existing historically designated boathouse, exterior windows and doorways, electrical service, and an integrated boat life mechanism in the

interior. The structure is proposed to be built atop existing piers/decking which is attached and adjacent to the existing, historically designated boathouse located on the bed of Catfish Lake, adjacent to the applicants' property located in the SE ¼ of the SE ¼ of Section 36, Township 40 North, Range 10 East, in the Town of Washington, Vilas County.

2. On June 13, 2014, the Department denied the applicants' permit application. The Department received a Request for Administrative Review from Attorney Timm P. Speerschneider, on behalf of the applicants. By letter dated August 8, 2014, the Department granted a contested case hearing, but limited the issues for hearing to the following:

1. Whether the Department properly complied with the statutory requirements for public notice, comment and opportunity for hearing pursuant to Wis. Stat. § 30.208.
2. Whether the Department properly determined that the proposed boathouse addition will materially obstruct navigation.
3. Whether the Department properly determined that the proposed boathouse addition will be detrimental to the public interest in the navigable waters of Catfish Lake on the Eagle Chain of Lakes.

3. On December 8, 2014, the Division of Hearings and Appeals received the Request for Hearing from the Department of Natural Resources.

4. Catfish Lake is navigable in fact at the project site and is designated as an Area of Special Natural Resource Interest (ASNRI) due to the presence of endangered, threatened, or special concern species.

5. The existing boathouse is a historically designated structure listed on the State and National Register of Historic Places in Wisconsin Reference Number 93001169.

6. The existing boathouse covers approximately 5085 square feet, including attached piers/decks located entirely below the ordinary high water mark (OHWM) of Catfish Lake. The existing building envelope covers approximately 2520 square feet and the exiting decking covers approximately 2565 square feet.

7. The existing boathouse enclosure is 45' wide as viewed from the lake (South). The height is 10' from the lower deck to the upper deck, and 32' from the lower deck to the roof peak.

8. The proposed structure consists of an approximate 810 square feet increase in water surface area coverage as depicted in plans dated March 21, 2014. The addition includes a 45' x 20' building envelope with a flat roof, set atop existing decking. The enclosure is positioned apart and back from, yet attached to the exiting boathouse by means of a covered connecting bridge and existing lower decking.

9. The proposed structure enclosure measures 20' wide as viewed from the lake (South), the height is 10' from the lower deck to the upper deck, and 23'6" from the lower deck to the top of the bridge railing. The connecting bridge structure is 23' wide and approximately 4.5' tall from the bottom of the support beams to the top of the railing, as viewed from the lake as depicted in plans dated March 21, 2014.

10. The applicants stated purpose for the addition is for use as a boathouse to store a classic wooden boat; a 34' long, 10'6" wide Shepherd runabout. The applicants indicated that his preference is for the boat to be kept in the water all season under cover and stored in the same moist environment, covered and over the ice, during the offseason.

11. The applicants have stated that the existing boathouse was not suitable for storage of the boat in question and that modification of the existing boathouse was not feasible.

12. On August 27, 2012, the applicants submitted an Exemption Determination Request (EDR) to the Department for the addition of approximately 940 square feet of new walkways attached to the existing boathouse in the location of the proposed structure. The EDR was granted by default due to delayed Department response indicating that the proposed pier/walkway addition would not qualify for such an exemption due to Catfish Lake's ASNRI designation and the fact that the structure being proposed did not meet the definition of a pier and was considered to be a miscellaneous structure requiring an individual permit (see Martye Griffin response dated September 24, 2012). The additional walkways were constructed during the winter of 2013.

13. On May 6, 2013, the Wisconsin Historical Society (on behalf of the applicants) submitted a revised property boundary description to the U.S. Department of the Interior National Park Service to include the additional piers which were constructed per the EDR (see finding above) in the historical listing. The NPS accepted the boundary clarification on June 14, 2013, as described in the WHS letter dated July 1, 2013.

14. On April 30, 2012, Water Management Specialist (WMS) Kyle McLaughlin and Waterway Field Supervisor Scott Watson conducted an on-site pre-application meeting with the applicants. On August 16, 2012, WMS Kyle McLaughlin, Lakes Biologist Kevin Gauthier, Fisheries Biologist Steve Gilbert, and Conservation Warden Tim Price conducted an on-site assessment of the navigational, aquatic habitat, natural scenic beauty, and public interest considerations of Sunset Bay by boat.

15. The applicants applied to the Department for an individual permit under Wis. Stat. § 30.12(3m) on May 18, 2012, with a proposal to complete a similar project and withdrew the application on February 10, 2014, prior to submitting the instant application on February 13, 2014.

16. The notice of pending application was published on the Department's website on April 14, 2014.

17. According to an email from Mr. Goluska on June 10, 2014, the Class 1 notice was published in the local newspaper on June 11, 2014, and mailings to interested parties on June 9, 2014. Each of these events as required in Wis. Stat. § 30.208(5) occurred beyond the official 30 day public comment period which extended until May 14, 2014, as determined by the date the notice was published on the Department's website April 14, 2014 as described in Wis. Stat. § 30.208(5).

18. There is no basis to conclude that the permit application must be approved due to any failure to provide notice. (McLaughlin and Griffin) Rather, the Department fulfilled its legal obligation in a timely manner when the notice of pending application was published on the Department's website on April 14, 2014. (Id.) Any extension of the public comment period after this publication, by virtue of the newspaper publication and notice to interested parties, was a harmless error and does not result in automatic granting of this permit. The applicants have not established any harm from the extension of the public comment period, and has not cited any statute or code that requires granting the permit under these circumstances.

19. Catfish Lake contains a high quality fishery and is very popular with sport anglers, particularly for walleye and yellow perch. (Gilbert) The area in the vicinity of the proposed boathouse contains two sites which have been identified through DNR netting surveys to be important spawning sites for walleye and yellow perch. (Gilbert, Exs. 151, 153, 155) DNR Senior Fisheries Biologist Steve Gilbert testified that, in his professional opinion, the proposed boathouse would negatively impact the fishery, and that likely cumulative impacts from similar expansion of boathouse projects would have a further detrimental impact. The petitioner did not present any expert testimony on this issue and Gilbert's testimony was both persuasive and unrefuted.

20. The area around the proposed boathouse also contains a healthy and diverse aquatic plant community. (Gauthier) DNR Lakes Biologist Kevin Gauthier testified that the proposed project would have a detrimental impact beneath the proposed boathouse, where he would expect to find no or minimal aquatic plant life. Gauthier also testified that there would be secondary detrimental impacts as a result of increased boat traffic and disturbance creating a more favorable environment for the most aggressive aquatic plants such as Eurasian Water Milfoil. (Id. Ex. 152, 158, 161) Mr. Gauthier testified that impacts to the aquatic plant community are not isolated in the footprint of a disturbance, but rather grow outward from the disturbance. Mr. Gauthier provided unrefuted expert testimony that the proposed boathouse would be detrimental to the aquatic plant community in the area, and that the cumulative impacts from similar projects would be detrimental to overall lake health. (Id., Ex. 152) Again, Petitioner has offered no evidence to contradict the credible and knowledgeable testimony of an experienced lakes biologist.

21. Habitat fragmentation is also an important consideration with regard to wildlife habitat. DNR Wildlife Biologist Michelle Woodford presented testimony that lakeshore development is detrimental to many species that use the near shore area in various life stages. Woodford Direct. Ms. Woodford testified that impacts like those from the proposed boathouse can work to interrupt the food web of near-lake ecosystems, thus having potentially profound impacts on wildlife, especially when considered cumulatively with the impacts of similar

projects. Id. Ms. Woodford supported her testimony with numerous publications solidifying the point that lakeshore development can be detrimental to wildlife due to habitat fragmentation. (Exs. 167-170) The Petitioner did not provide any rebutting expert testimony on this point.

22. The petitioner did establish that the likely cumulative detrimental impacts from similar projects would be diminished by the fact that few other boathouses in the area would be eligible to be listed on the national historic registry, and that fewer still would succeed in obtaining approval of any addition to the boathouse as the Goluskas have in this matter. (Goluska) Nonetheless, while diminished by this rigorous historic registry process, the Department experts still provided un rebutted testimony that there would be likely detrimental cumulative impacts from approval of the instant application.

23. The applicants have carried their burden of establishing that covering the decking area with the boathouse addition would not result in any further material obstruction to navigation beyond that which has already occurred by virtue of the decking taking the area out of the area available to the public.

24. The applicants have carried their burden of establishing that covering the decking area with the boathouse addition would not result in any detrimental impact to natural scenic beauty sufficient to warrant denial of the permit on that basis alone. Historic boathouses are an established feature on Catfish Lake and the applicants have put forth a design that is consistent with the historic use and aesthetic characteristics of the existing boathouse.

25. The petitioner has not carried his burden of proof to establish that the project would not be detrimental to the public interest to Catfish Lake.

## DISCUSSION

The applicants' argument that the general provisions of § 30.121 do not apply to boathouses listed on the national historic registry does comport with the plain language of Wis. Stat. § 30.121(5). However, the Department was right to seek an individual § 30.12(3m) structure permit for the boathouse expansion.

Pursuant to § 30.12(3m)(c), the department shall issue an individual permit to a riparian owner if the department finds that all of the following requirements are met:

1. The structure or deposit will not materially obstruct navigation.
2. The structure or deposit will not be detrimental to the public interest.
3. The structure or deposit will not materially reduce the flood flow capacity of a stream.

The boathouse is on a lake so sub 3.) does not apply. The applicants have carried their burden of proof that the structure or deposit will not materially obstruct navigation. As he notes, the Department did not even address this issue in its brief. However, the applicants have not shown that the structure or deposit will not be detrimental to the public interest.

The applicants received authorization to place pilings and a platform on the bed of Catfish Lake due to a legal technicality, specifically the Department's failure to review his application in a timely manner. Now he argues that there will be no further detrimental environmental impacts because the pilings and platform for open boat slips have already been installed and any damage has happened. (Petitioner's Initial Brief, p.22) He argues that the DNR's analysis in its denial was based upon the environmental impacts expected before the pilings and boat slips had been installed. However, this argument does not hold up because the DNR presented numerous live witnesses experts who provided unrefuted testimony that placing another boathouse at the site would have further detrimental impacts to the ecology and fishery at and around the project site.

The project proponent has clearly not carried his burden of proof in this matter.

Further, the notice issues raised by the petitioner do not establish any errors by the Department that warrant his argument that he is entitled to a second free pass from Chapter 30 requirements because the Department failed to act in a timely manner. DNR witnesses McLaughlin and Griffin both testified that the public had ample time to comment on the project and that the Department met its notice obligation by timely publishing the notice of pending application on the Department's website April 14, 2014.

The Department's denial must be affirmed.

## CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority pursuant to Wis. Stat. §§ 30.12(3m) and 227.43 and the foregoing Findings of Fact, to issue an order granting or denying the requested structures permit.
2. The proposed structure meets the definition of a boathouse under Wis. Stat. ch. 30.01(1d). The general provisions of §30.121 do not obtain to boathouses listed on the national historic registry §30.121(5), Stats. However, any additions to such a boathouse require an individual structures permit pursuant to Wis. Stat. §§ 30.12(3m).
3. The project proponent bears the burden of proof in this proceeding pursuant to § 30.209(2).
4. The petitioner has not carried his burden of proof in demonstrating that the proposed project would not be detrimental to the public interest in navigable waters pursuant to Wis. Stat. §§ 30.12(3m)(c). The DNR presented numerous undisputed expert witnesses who testified that the project would be detrimental to the public interest in maintaining the aquatic plant community and fishery values at and near the project site. (Gauthier, Woodford, McLaughlin)
5. The petitioner did carry his burden of demonstrating that the project would not materially obstruct navigation.

6. Notice for public comments is deemed to be provided when the Department first publishes notice on its internet website. § 30.208(5)(bm) The public was given lawful notice to comment on the proposed project and there is no basis to deem the permit rendered because of and defective notice.

7. The Department has complied with Wis. Stat. § 1.11. This permit process constitutes an equivalent analysis under Wis. Admin. Code NR 150.20(2)(a)(11).

### ORDER

WHEREFORE IT IS HEREBY ORDERED, that the Department of Natural Resources' permit denial be affirmed and the petition for review dismissed.

Dated at Madison, Wisconsin on October 5, 2015

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DIVISION OF HEARINGS AND APPEALS  
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By: \_\_\_\_\_  
Jeffrey D. Boldt  
Administrative Law Judge

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.